

No. 4685.

---

---

IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

---

Maryland Casualty Company, a Corporation,

*Plaintiff in Error,*

*vs.*

The Citizens National Bank of Los Angeles, a Banking Corporation,

*Defendant in Error.*

---

PETITION FOR REHEARING.

---

W. S. BICKSLER,

W. C. SMITH,

DALE H. PARKE.

*Attorneys for Plaintiff in Error.*



No. 4685.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

---

Maryland Casualty Company, a Corporation,

*Plaintiff in Error,*

*vs.*

The Citizens National Bank of Los Angeles, a Banking Corporation,

*Defendant in Error.*

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:*

Your petitioner, Maryland Casualty Company, a corporation, plaintiff in error herein, respectfully petitions this court to grant your petitioner a rehearing, and for grounds thereof states:

Plaintiff in error contends that the trial court erred in its conclusions of law and in entering judgment for defendant in error on its special findings of fact; that this error is a plain error of law and such error was not

decided or passed upon by this court although duly presented by the record and by brief of plaintiff in error, all as herein more fully set forth and shown.

We quote from the opinion of this court as follows:

“The bill of exceptions must therefore be disregarded, and this leaves for consideration only the sufficiency of the complaint, *and the sufficiency of the special findings to support the judgment.* (Italics ours.) While these questions are raised by the assignments of error, unfortunately the assignments are discussed in the brief in connection with other assignments which depend upon the bill of exceptions and we are left somewhat in the dark as to the particular objections urged against the complaint and findings alone.”

The court in its opinion considered and passed upon the question raised by the brief as to the sufficiency of the complaint, but it did not decide or pass upon the questions of law on the special findings of fact as presented and raised by subdivision IV, at page 76, of the brief of plaintiff in error. This point which was raised and presented to this court is as follows, to-wit:

*“The Cotton Company during the latter part of 1920 became a corporation sole, to-wit: J. B. Sears, and thereafter J. B. Sears, the “risk” named in the bond, was in complete ownership and control of the Cotton Company. That on and after the date when such complete ownership and control was obtained by J. B. Sears, the Cotton Company, to-wit: J. B. Sears, had no right of action to recover for any loss sustained by the wrongful acts of J. B. Sears, whether committed prior to or subsequent to the date on which the ownership and control of the Cotton Company was acquired*

*by Sears. For that reason the trial court erred in finding judgment against the defendant and in refusing to grant defendant's motion for judgment for defendant. In view of the finding of fact that the Cotton Company became a corporation sole, to-wit: J. B. Sears, on December 1st, 1920, the trial court erred in its conclusion of law that the plaintiff (assignee for collection of the Cotton Company) was entitled to judgment for any loss resulting from the wrongful acts of J. B. Sears."*

The questions of law presented under subdivision IV, at page 76 in brief of plaintiff in error, were, as indicated by the opinion of this court, properly before this court for consideration.

Assignment of error number 27, found at page 47, in brief of plaintiff in error, is as follows:

"That the court erred in its conclusions of law in finding that the plaintiff is entitled to judgment against the defendant on its first cause of action in the sum of \$24,321.97, together with interest thereon, or any sum whatsoever."

The brief of plaintiff in error, at page 80, duly presented to this honorable court the fact that the trial court made a special finding of fact [Transcript of Record, page 149] that J. B. Sears on December 1st, 1920, purchased all the capital stock of the Cotton Company from T. J. West, and that after December 1st, 1920, the Cotton Company was a corporation sole, to-wit: J. B. Sears. Plaintiff in error urged at length in its brief that in view of this special finding it fol-



lowed as a matter of law that when Sears acquired the ownership of all of the stock of the Cotton Company he acquired and became the owner of any claims which the Cotton Company, to-wit: T. J. West, then had under the bond sued upon against the bonding company (plaintiff in error herein) and arising from his (Sears') wrongful acts; that the acquisition and ownership by Sears of all of the capital stock of said Cotton Company was at the same time the acquisition and ownership of any such claim based upon his own wrongful act, and that such acquisition of ownership of such claim thereby terminated all liability of the bonding company thereon; and that Sears, a corporation sole, doing business as the Cotton Company, or the defendant in error (assignee for collection) could not therefore legally enforce any such claims against the plaintiff in error herein.

Any claim on the bond, existing in favor of the Cotton Company prior to the date when Sears acquired ownership thereof and became the Cotton Company, a corporation sole, ceased to exist when owned by said Sears; that said claim was thereby terminated and extinguished; that thereafter there was not and could not be any claim which could be assigned to the defendant in error herein. The point of law was urged to this honorable court in the brief of plaintiff in error that a person can not have an enforceable claim against another person for loss resulting from his, claimant's, own wrongful acts; that, therefore, when Sears became the owner of such claim, as a corporation sole, he or

his assignee for collection could not maintain any action thereon. The findings of fact show that he was such corporation sole at the time of his death, and thereafter the corporation could not revive nor resuscitate any such claim against the plaintiff in error herein, nor by assignment thereof for collection give any rights whatever to the defendant in error herein. It need not be urged that the assignment of said claim to the defendant in error solely for the purpose of collection did not give it any greater right to enforce the same than existed in favor of J. B. Sears during his lifetime.

The law touching these questions was fully argued in brief of plaintiff in error, at page 81, and the statement thereof was and is as follows:

“The liability of the insurer is never greater than the liability of the risk to the insured. The merging of the risk (J. B. Sears) and the insured (Cotton Company) in the same person extinguished the claim and released the liability of the insurer.

“The sale by West, a corporation, to Sears, a corporation sole (the risk) released Sears as principal on the bond, which release discharged the surety.”

And the authorities to support the contentions of plaintiff in error are fully set forth on pages 81 to 95.

The foregoing points of law raised by the record and presented at length in the brief of plaintiff in error are based on the judgment roll, to-wit: on the special findings of fact and conclusions of law made and entered by the Honorable District Court and are not based or at all dependent upon the bill of exceptions.

Your petitioner herein respectfully contends that this court did not pass upon these points of law so raised and presented by plaintiff in error, no mention thereof being made in the opinion of this court in affirming the judgment.

Your petitioner respectfully contends that the trial court made a plain error of law in its said conclusion of law, to-wit: that the defendant in error was entitled to judgment so given, made and rendered in its favor; that this plain error was duly raised and presented to this court, and your petitioner respectfully submits that it is entitled to the opinion and judgment of this honorable court thereon, and that it is entitled to a rehearing and to a reconsideration of the points of law so raised and presented, and to a reversal of the judgment of the said District Court.

Respectfully submitted,

MARYLAND CASUALTY COMPANY, A CORPORATION,

By W. S. BICKSLER,

W. C. SMITH,

DALE H. PARKE.

*Its Attorneys.*



CERTIFICATE.

Come now the undersigned, W. S. Bicksler, W. C. Smith and Dale H. Parke, counsel for plaintiff in error, and certify that in our judgment the foregoing petition for rehearing is well founded in law and fact, and further certify that said petition is not interposed for delay.

..... W. S. Bicksler .....  
..... W. C. Smith .....  
..... Dale H. Parke .....

